517

SUPREME COURT OF THE UNITED STATES.

No. ~~84~~. 45.

WILLIAM KING, APPELLANT,

VERSUS

JOHN MITCHELL ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

INDEX.

	Original.	Print.
Bill filed and injunction granted	1	2
Bill	2	2
Injunction bond	5	4
Subpœna	6	5
Order of publication vs. same defendants	7	5
New subpœna against White and Heiskell and wife	8	6
James White's answer	9	7
New subpœna against Heiskell and wife	12	8
New subpœna against same	13	9
William King's answer filed, leave to amend bill, and White's answer, and set for hearing	14	9
William King's answer	15	10
Last order set aside	18	11
Dismissed as to all defendants except William King	18	11
William King's answer filed	18	11
The cause set for hearing	18	11
Decree	18	11
Appeal granted, and bond	19	12
Opinion of supreme court in Findlay and Mitchell against King's lessee	21	13
Clerk's certificate	37	21

UNITED STATES OF AMERICA, *Western District of Virginia,* } *sct.*

Pleas before the United States' district court, for the western district of Virginia, held at Wythe court-house, before the honorable Alexander Caldwell, Esq., Judge, on the 20th day of September, in the year of our Lord eighteen hundred and thirty-two.

Be it remembered, that heretofore, to wit, at a district court of the United States, aforesaid, held on the 24th day of September, 1830.

JOHN MITCHELL; ABRAM TRIG, and Polly, his wife; GEORGE V. LITCHFIELD, and Rachel, his wife; JOSEPH TRIGG, and Elizabeth, his wife; JOHN GOODE, and Nancy, his wife; LITTLETON HENDERSON, and Mary, his wife; WILLIAM HICKMAN, and ANN HICKMAN, infant children of Sally Hickman, by Adam Hickman, their father and next friend; WILLIAM K. TRIGG; and DANIEL TRIGG; and ALEXANDER FINDLAY—*plaintiffs*—

versus

WILLIAM KING; JAMES WHITE; ALEXANDER McCALL, and Rachel Eliza, his wife; THOMAS KING; SALLY BULLERS; STUART, and Margery, his wife; PEGGY ALLEN; WILLIAM KING, son of Samuel King, WILLIAM HEISKELL, and Elizabeth, his wife—*defendants.*

[*Injunction granted.*]

On the motion of the plaintiffs, who filed their bill, an injunction is awarded them, to stay, until the further order of this court, all proceedings on a judgment therein obtained on the 21st day of September, 1826, by John Doe, lessee of William King, against Alexander Findlay and John D. Mitchell. But the effect of this injunction is to be suspended until the said plaintiffs, or either of them, shall enter into bond, with one or more sufficient securities, in the clerk's office, in the sum of three hundred dollars, conditioned as the law requires. The plaintiffs' bill is in these words and figures:

[*Bill.*]

To the honorable Alexander Caldwell, Judge of the court of the United States for the western district of Virginia: Humbly complaining, showeth unto your honor, your orators and oratrixes, John Mitchell; Abram Trigg, and Polly, his wife; George V. Litchfield, and Rachel, his wife; Joseph Trigg, and Elizabeth, his wife; John Goode, and Nancy, his wife; Littleton Henderson, and Mary, his wife; William Hickman, and Ann Hickman, infant children of Sally Hickman, by Adam Hickman, their father and next friend; William K. Trigg; and Daniel Trigg; and Alexander Findlay—all citizens of Virginia. That, on the 13th October, 1808, William King, of Abingdon, departed this life, having first duly made his last will and testament, which, after his decease, was duly admitted to record, according to the laws of Virginia, a copy of which your orators and oratrixes herewith exhibit, and pray to be taken as part of this bill. Among the different devises and bequests contained in the said will, the testator directed as follows: "In case of having no children, I then leave and bequeath all my "real estate, at the death of my wife, to William King, son of my brother, "James King, on condition of his marrying a daughter of William Triggs

"and my niece Rachel, his wife, lately Rachel Findlay, in trust for the "eldest son or issue of said marriage; and in case such marriage should not "take place, I leave and bequeath said estate to any child, giving preference "to age, of the said William and Rachel Trigg, that will marry a child of "my brother, James Kings, or of sister Elizabeth, wife of John Mitchell, "and to their issue." At the death of the testator, (who had no children) he had living a brother of the whole blood, named James; a sister of the whole blood, named Nancy, the wife of Conally Findlay; a brother of the half blood, named Samuel; a sister of the half blood, named Hannah, wife of John Allen. The said Nancy Findlay, Samuel King, and Hannah Allen, were aliens. The said Nancy Findlay had children, born in the United States, and capable of inheriting real estate—your oratrixes Elizabeth Trigg, Nancy Goode, Mary Henderson, and Sally Hickman, mother of your orator and oratrix, William Hickman and Ann Hickman. The said Nancy had a daughter, who was born in Ireland, named Rachel, wife of William Trigg, who had children, to wit, your orators William K. Trigg and Daniel Trigg, born in Virginia, before the death of the testator.

The said Samuel King, who is since dead, had a son named William. The said Hannah Allen, who is also since dead, had three children, to wit, Sally Bullers; Margery, who intermarried with Stuart; and Peggy. Besides these persons, who were heirs at law of the testator, your orator John Mitchell, and your oratrixes Polly Trigg, Rachel Litchfield, and Elizabeth Heiskell, wife of William Heiskell, were entitled to one-fourth part of the testator's real estate, had he died intestate, being the children of Elizabeth Mitchell, sister of the whole blood of the testator, born, and capable of inheriting, at the time of his death, their mother being dead. The said James King afterwards departed this life, leaving three children, to wit, the said William King, Thomas, and Rachel Eliza, since intermarried with Alexander McCall. The said William Trigg, mentioned in the testator's will, died in 1813, without ever having had any daughter by his wife Rachel. Your orators Alexander Findlay and John Mitchell, by the consent of the other heirs who resided in the country, took possession of some part of the estate of the testator, situate in Abingdon, being advised that the clause in the will, before recited, had become inoperative. In 182 , the said William King, resident in Tennessee, instituted an ejectment in this honorable court, against your said orators, claiming the whole of the real estate of the testator, under the clause aforesaid. Your orators defended the cause, and a case was stated for the opinion of the court, on which judgment was pronounced in favor of the plaintiff. A writ of error was prosecuted in the Supreme Court, where the judgment was affirmed at the last term. A majority of the last mentioned court were of opinion that, by the said clause, the real estate of the testator vested in the said William King, IN TRUST; but on the question whether, in the events that have happened, the beneficial interest was in the said William, or whether he held it as a trustee for the heirs of the testator, they did not mean to indicate any opinion—that being a question for a court of chancery, which could not be determined until a bill should be brought to enforce the execution of the trust. Your orators and oratrixes herewith exhibit a copy of the opinion of a majority of the court, delivered by the Chief Justice, and pray that the same may be considered as part of this bill.

Your orators and oratrixes suppose that the said William King, who still resides in Tennessee, will carry into effect the judgment which he has ob-

tained, and which stands affirmed. They insist that the said William King is a mere trustee, holding the benefical interest for the testator's heirs at law. Your orators and oratrixes beg leave further to represent, that the object of the testator's bounty was he who should unite in himself the blood of his own family and that of the family of his wife. The said William Trigg was the brother of the latter. It is not presumable that the testator would have deprived his heirs at law of any part of his estate, had he anticipated a total failure of his object. To effect a union of the two families was his only motive, and he appears to have been anxious to accomplish the purpose desired. Your orators and oratrixes, therefore, contend that, as it has wholly failed, that the estate ought to go to those who represent the testator. To the end, therefore, that the said William King; James White, who has acquired the interest of William Heiskell and wife, and also a part of the said William King's claim to the real estate; Alexander McCall, and Rachel Eliza, his wife; Thomas King; Sally Bullers; Stuart, and Margery, his wife; Peggy Allen; William King, son of Samuel King, who are all citizens of other States, except the said James White; and William Heiskell, and Elizabeth, his wife, may be made defendants hereunto; and that they may answer the premises as fully and truly as if the whole was again repeated in the form of interrogatories.

That the said William King may be compelled to execute the trust confided to him by the said will, in such manner as this honorable court may think proper: that the proceedings on the said judgment may be stayed until your orators and oratrixes' case can be fully heard, and that a perpetual injunction may be directed; and that your orators and oratrixes may have such other and further relief, in the premises as their case may require, and as may be consistent with the principles of equity; may it please your honor to grant your orators and oratrixes a writ of injunction to stay the proceedings on said judgment and subpœna, directed, &c. commanding, &c.

Endorsed. Allowed, on giving bond and security, in the sum of $300, in the clerk's office.

A. CALDWELL,
Judge of the W. D. Virginia.

An injunction bond was executed in the clerk's office, on the 30th day of September, 1830, in the words and figures following:

[*Injunction Bond.*]

Know all men by these presents, that we, John Mitchell and William H. Spiller, are held and firmly bound unto William King; James White; Alexander McCall, and Rachel Eliza, his wife; Thomas King; Sally Bullers; Stuart, and Margery, his wife; Peggy Allen; William King, son of Samuel King; William Heiskell, and Elizabeth, his wife, in the sum of three hundred dollars, to which payment, well and truly to be made to them and their heirs, &c. we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 24th day of September, 1830.

The condition of the above obligation is such, that whereas the above bound John Mitchell, with others, hath obtained an injunction from the honorable the judge of the district court of the United States for the western district of Virginia, held at Wythe court house, to stay, until the further order of said court, all proceedings on a judgment therein obtained, on the

21st day of September, 1826, by John Doe, lessee of William King, against Alexander Findlay and said John Mitchell Now, if the said John Mitchell shall well and truly pay and satisfy all such damages and costs as shall be awarded against him and the others who have obtained said injunction, in case the said injunction shall be dissolved, then the above obligation to be void, else to remain in full force and virtue.

JOHN D. MITCHELL. [SEAL.]
W. H. SPILLER. [SEAL.]

Teste: JOHN FOSTER.

Whereupon, a subpœna was issued, as follows:

[*Subpœna.*]

The President of the United States of America to the marshal of the western district of Virginia, greeting: You are hereby commanded to summon William King; James White; Alexander McCall, and Rachel Eliza, his wife; Thomas King; Sally Bullers; Stuart, and Margery, his wife; Peggy Allen; William King, son of Samuel King; and William Heiskell, and Elizabeth, his wife, citizens and inhabitants of the State of Virginia, and other States, and of the judicial district aforesaid, to appear before the judge of the court of the United States for the western district of Virginia, at Wythe court-house, on the first Monday in November next, to answer a bill in chancery exhibited against them in our said court, by John Mitchell; Abram Trigg, and Polly, his wife; George V. Litchfield, and Rachel, his wife; John Goode, and Nancy, his wife; Littleton Henderson, and Mary, his wife; William Hickman, and Ann Hickman, infant children of Sally Hickman, by Adam Hickman, their father and next friend; William K. Trigg; and Daniel Trigg; and Alexander Findlay, citizens and inhabitants of the State of Virginia, and other States; and this they shall in no wise omit, under the penalty of 333⅓ dollars each. And have then there this writ. Witness: Alexander Caldwell, esq., judge of the United States for the said district, at Wythe court-house, this 25th day of September, one thousand eight hundred and thirty, and in the 55th year of the independence of the United States of America.

[L. S.] J. Y. DODDRIDGE,
Clk. U. S. Dist. Court.

Marshal's Return.—The defendants, except James White, and William Heiskell and wife, are no inhabitants of Virginia, and not executed on said White, and Heiskell and wife, for want of time.

LEONARD STRAW, *D. M.*, for
B. REEDER, *Marshal.*

[*Order Publication.*]

And at rules held in the clerk's office of the district court of the United States, aforesaid, on Monday, November 1st, 1830, the defendants, William King; Alexander McCall, and Rachel Eliza, his wife; Thomas King; Sally Bullers, Stuart, and Margery, his wife; Peggy Allen; and William King, son of Samuel King, not having entered their appearance and given security, according to the rules of this court, and it appearing that they are not inhabitants of Virginia: on the motion of the plaintiffs, by their counsel, it is ordered that the said defendants do appear here on the first day of

the next term, and answer the bill of the plaintiffs; and that a copy of this order be forthwith inserted in some public newspaper published in this State, for two months successively; and another copy posted at the front door of the court-house of Wythe county, on copies of which are the following certificates:

Wythe county, to wit: John Foster personally appeared before me, the subscriber, a justice of the peace for Wythe county, and made oath that he, on this 5th day of November, 1830, posted a true copy of the within order on the front door of Wythe court-house. Given under my hand, this 5th day of November, 1830.

CHRISTOPHER BROWN.

Wythe county, to wit: This day personally appeared before me, Jacob Haller, a justice of the peace for Wythe county, John G. Ustick, and made oath that he has published the annexed notice in his paper, the Western Virginia Argus and Farmers' Register, for two months successively. Given under my hand, this 25th day of June, 1831.

JACOB HALLER.

And on the motion of the plaintiffs, by their counsel, a new subpœna was awarded them against the defendants, James White and William Heiskell and wife, which was issued in these words and figures:

[*New Subpœna.*]

The President of the United States of America to the marshal of the western district of Virginia, greeting: You are hereby commanded, as before you have been commanded, to summon James White, and William Heiskell and Elizabeth his wife, citizens and inhabitant of the State of Virginia, and of the judicial district aforesaid, to appear before the judge of the court of the United States for the western district of Virginia, at Wythe court-house, on the first Monday in February next, to answer a bill in chancery, exhibited against them and others, in our said court, by John Mitchell and others, citizen and inhabitant of the State of Virginia, and other States; and this they shall in no wise omit, under the penalty of 333⅓ dollars each. And have then there this writ. Witness: Alexander Caldwell, esq., Judge of the United States for the said district, at Wythe court-house, this 5th day of November, one thousand eight hundred and thirty, and in the 55th year of the independence of the United States of America.

[L. S.] J. Y. DODDRIDGE,
Clk. U. S. Dist. Court.

Marshal's Return.—Executed on James White, a citizen of Washington county; not executed on Heiskell and wife.

LEONARD STRAW, *D. M.*, for
[Fee $5 00.] B. REEDER, *Marshal.*

And at December rules, 1830, and January, February, March, April, May, June, July, and August rules, 1831, this cause was continued for the answers of the defendants.

And at September rules, 1831, came the defendant, James White, by his counsel, and filed his answer, to which the plaintiffs replied generally, and

general commissions to take depositions were awarded. The said answer is in these words and figures:

[*James White's Answer.*]

To the honorable Alexander Caldwell, Judge of the United States for the western district of Virginia. The answer of James White to a bill of complaint exhibited in this honorable court, by John Mitchell, Abram Trigg, and Polly his wife, and others, against William King, this respondent, and others. This respondent, saving and reserving all right of exception to the said bill, for answer, saith: That it is true that William King, of Abingdon, did make his last will and testament on the 3d of March, 1806; and that the same, after his death, was duly admitted to record according to the laws of Virginia—all which will more fully appear from a transcript of the said will, and the order admitting it to probate, exhibited by the complainants. Your respondent admits that the said will contains the clause set forth in the bill; he admits that the testator died without having children; and that Thomas King, the father of the testator, died before the said William King, the testator. The respondent also admits that the persons named in the bill, including the complainants, and all the defendants, except this respondent, are the heirs at law of the said William King, the testator. This respondent also admits that the complainants are all residents of Virginia, and that this respondent, and William Heiskell and wife, are also residents of Virginia; and that all the other defendants are residents of other States. This respondent also admits that he has acquired all the rights of the said Heiskell and wife to the real estate of William King, whatever their interest, if any, may be, by purchase. This respondent also admits that he has acquired, by purchase, the right of William King, son of James King, as heir of William King, the testator; and also as devisee of his father, James King, in the interest of the said James in the salt works. He has also acquired one-half of the interest of the said William King, as devisee of his uncle, William King, the testator, in the *salt* works, and land appurtenant thereto, in the county of Washington, Virginia—as will more fully appear by a copy the transfer fromthe said William King to this respondent, herewith exhibited, as a part of this answer, marked (A—A.) Your respondent also admits that William Trigg died in 1813, without ever having a daughter; he also admits that no child of William Trigg, by his wife Rachel, ever did intermarry with any child of James King or of Elizabeth Mitchell, and that no such marriage is likely to take place, because all the children of William and Rachel Trigg are sons, and the only daughter of James King, and all the daughters of John Mitchell and his wife, are married to other persons. Your respondent also admits that William King, the son of James, who is a resident of Tennessee, did cause an action of ejectment to be instituted in this honorable court against the complainants, John Mitchell and Alexander Findlay, the tenants in possession, for a house and lot in the town of Abingdon, of which William King, the testator, died seized; that on a case agreed, a judgment was rendered in this honorable court in favor of the plaintiff, which judgment was affirmed by the Supreme Court of the United States—all which will more fully appear from the record in the said cause, exhibited by the complainants as a part of their bill. This respondent insists that the condition on which the testator devised his real estate to his nephew William King, son of James, was a condition subse-

quent; and that, therefore, the estate vested in the devisee immediately on the death of the testator; and that a performance of the condition having become impossible, without the default of the devisee, the estate was divested of the condition, and became absolute; because, as your respondent respectfully contends, an impossible condition is the same as no condition; that it is void, and consequently there can be no breach. Your respondent does not admit that William King, the devisee, is "a mere trustee, holding the beneficial interest for the heirs at law." But your respondent contends, that, under the will, the devisee is entitled to the beneficial interest. Your respondent contends that it manifestly appears, from the will, that the testator did not intend that his immense estate, in any event, should descend to his heirs at law. The value of the estate would be greatly diminished by a separation of interests. To render the salt works, the most valuable part of the estate, valuable to any extent, it is necessary that the operations should be carried on without competition; in order to effect this object, the testator, in his life time, paid annually a high premium to Gen. Francis Preston to permit his salt works, in the neighborhood, to lie idle. Nothing, therefore, could have been further from the intention of the testator than to diminish the value of this property, by permitting it to descend and be divided among his heirs at law. Your respondent, having fully answered the said bill of complaint, prays to be dismissed with his costs.

DRAPER.

Wythe county, to wit: This day personally appeared before me, the undersigned, a justice of the peace for Wythe county, James White, and made oath that the statements contained in the foregoing answer, so far as they are made of his own knowledge, are true; and, so far as made on the information of others, he believes them to be true. Given under my hand and seal, this 8th day of September, 1831.

JOHN STANGER. [SEAL.]

And at October rules, 1831, on motion of the plaintiffs, by their counsel, a new subpœna was awarded them against the defendants, William Heiskell and wife, returnable to the then next February rules, and the cause was continued. The said new subpœna was issued as follows:

[*New Subpœna.*]

The President of the United States of America to the marshal of the western district of Virginia, greeting: You are hereby commanded, as before you have been commanded, to summon William Heiskell and Elizabeth his wife, citizens and inhabitants of the State of Virginia, and of the district aforesaid, to appear before our judge of the district court of the United States for the said district, at Wythe court-house, on the first Monday in February next, to answer a bill in chancery exhibited in our said court against them and others, by John Mitchell and others, citizens and inhabitants of the State of Virginia, and other States; and unless they shall answer the said bill within four months thereafter, the court will take the same for confessed, and decree accordingly; and this they shall in no wise omit, under the penalty of the law. And have you then there this writ. Witness: the honorable Alexander Caldwell, judge of the district court of the United States for the western district of Virginia, at Wythe court-house,

this third day of October, in the year of our Lord 1831, and in the 56th year of the independence of the United States of America.

[L. S.] J. Y. DODDRIDGE,
Clerk U. S. C., W. D. Va.

The above subpœna was not taken from the office.

And at November and December rules, 1831, and January rules, 1832, this cause was continued.

And at February rules, 1832, on the motion of the plaintiffs, by their counsel, a new subpœna was awarded them against the defendants, William Heiskell and wife, returnable to the then next term, and the cause was continued. The said subpœna was issued in these words and figures:

[*New Subpœna.*]

The President of the United States of America to the marshal of the western district of Virginia, greeting. You are hereby commanded, as before you have been commanded, to summon William Heiskell, and Elizabeth, his wife, citizens and inhabitants of the State of Virginia, and of the district aforesaid, to appear before the Judge of the district court of the United States for the said district, at Wythe court-house, on the first day of the next term, to answer a bill in chancery, exhibited in our said court, against them and others, by John Mitchell and others, citizens and inhabitants of the State of Virginia, and other States; and unless they shall answer the said bill within four months thereafter, the court will take the same for confessed, and decree accordingly; and this they shall in no wise omit, under the penalty of the law; and have you then there this writ. Witness: the honorable Alexander Caldwell, judge of the district court of the United States for the western district of Virginia, at Wythe court-house, this 6th day of February, in the year of our Lord 1832, and in the 56th year of the independence of the United States of America.

[L. S.] J. Y. DODDRIDGE,
Clerk U. S. C., W. D. Va.

This subpœna was not taken from the office.

And at March, April, May, June, July, August, and September rules, 1832, this cause was continued.

[*William King's answer filed, leave to amend bill, and answer of White set for hearing.*]

And at a district court of the United States aforesaid, held on the 19th day of September, 1832, came the defendant, William King, and filed his answer, to which the plaintiffs replied generally. And on the motion of the plaintiffs, and by consent of the parties, the plaintiffs have leave to amend their bill, so as to show that the plaintiffs, Littleton Henderson, and Mary, his wife, are residents of Tennessee, and not of Virginia. And on motion of the defendant, James White, and by the consent of the parties, he has leave to amend his answer, so as to show that the said plaintiffs, Henderson and wife, are residents of Tennessee; and also to correct an error in the date of the will of William King, as set forth in his said answer. And by consent of the parties, this cause is set for hearing.

The answer of William King, referred to in the above order, is in these words and figures:

[*William King's answer.*]

To the honorable Alexander Caldwell, Judge of the United States court for the western district of Virginia. The answer of William King, a citizen and resident of the State of Tennessee, to a bill exhibited in this honorable court, holden at Wythe court-house, by John Mitchell and others, against this respondent and others; saving all legal exceptions to the said bill, this respondent, for answer, saith: that it is true, that William King, of Abingdon, did make and publish his last will and testament on the 3d March, 1806; and that the same, after his death, was duly proved and admitted to record, according to the laws of Virginia—to the provisions of which will this respondent refers, and on which he relies. He admits that Thomas King, the father of testator, William, died before the testator. This respondent admits that the persons named in the bill, including the complainants and all the defendants, (except the defendant James White) are the heirs at law of the said William King, the testator. This respondent also admits, that all the complainants (with the exception of Henderson and wife, who are residents of Tennessee) are residents of Virginia; and that all the defendants, with the exception of James White, and Heiskell and wife, are non-residents. This respondent admits that William Trigg died in 1813, without ever having had a daughter; he also admits, that no child of William Triggs, by his wife Rachel, ever did intermarry with any child of James King, or of Elizabeth Mitchell; and that no such marriage is likely to take place, because all the children of William and Rachel Trigg are sons, and the only daughter of James King, and all the daughters of John Mitchell and his wife Elizabeth, are married to other persons. Your respondent further admits that he did cause an action of ejectment to be instituted in this honorable court, that the facts were agreed, that judgment was rendered in his favor in this court, which, on a writ of error, was affirmed in the Supreme Court of the United States—all which will more fully appear by the record and opinion exhibited by the complainants as a part of their bill. This respondent insists, that the condition on which the testator devised his real estate to this respondent, was a condition subsequent; and that, therefore, the estate, with the exception of the salt works, which were devised to other persons during the life of the testator's wife, now Mrs. Smith, vested in this respondent, as devisee, immediately on the death of the testator; and that the salt works, by the same devise, will vest on the death of Mrs. Smith; and that a performance of the condition on which the devise was made, having become impossible, without the default of this respondent, the estate devised was divested of the condition, and became absolute. Your respondent respectfully contends, that an impossible condition, in such a case, is the same as if there were no condition; that there can be no breach, and that it is consequently void. Your respondent contends that he is not "a mere trustee, holding the beneficial interest for the heirs at law." But he contends that, under the devise, he is entitled to the beneficiary interest. Your respondent contends that it manifestly appears from the will, that he was the first and greatest object of the testator's bounty; he was his nephew; he bore his own name. To give to the will the construction contended for by the complainants in their bill, this respondent would be cut off without one cent of value under the devise, and with only a legacy of one thousand dollars, whilst others, less the objects of the testator's bounty, are amply provided for. He moreover contends, that it was evidently not the intention of the testator, that his immense real estate should in any event descend

to his heirs at law. The value of the estate would be diminished by a separation of interests. To render the salt works, the most valuable part of the estate, valuable to any extent, it *it* is necessary that the operations should be carried on without compe*tion*, either in the manufacture or the sales of the article. To effect this object, the testator, in his life time, paid annually a high premium to Gen. Francis Preston, to permit his salt works, in the neighborhood, to lie idle, although the works of the latter did not then, from the quantity and quality of the water, possess the capacity of making one-fifth part as much salt as the works of the testator, and the expense of making salt at Preston's wells, from the inferiority in the quality of the water, was much greater; yet the market and demand for the article being limited, the testator, to prevent even this unequal compe*tion*, paid a high premium, as aforesaid. Nothing, therefore, as this respondent respectfully contends, could have been further from the intention of the testator, than to diminish the value of this property, by permitting it to descend and be divided among his numerous heirs at law. This respondent having fully answered, prays that the bill of the complainants be dismissed, and that he recover his costs, &c.

DRAPER, *for Respondent.*

Wythe county, to wit: This day William King made oath, before the undersigned, justice of the peace for the county aforesaid, that he believes all the statements contained in the foregoing answer to be true. Given under my hand, this 11th day of September, 1832.

JOHN HALLER, *J. P.*

[*Last order set aside, dismissed as to all defendants except William King—William King's answer filed—Set hearing—Decree—And appeal granted.*]

And at a district court of the United States aforesaid, held on Thursday, the 20th day of September, 1832, by consent of the parties, by their attorneys, the order entered in this cause on yesterday is set aside; and thereupon, on motion of the plaintiffs, by their attorney, leave is granted them to dismiss the bill as to all the defendants except William King, as the same is hereby accordingly dismissed as to the said defendants. And thereupon came the defendant, William King, and filed his answer, to which the plaintiff replied generally. (The answer referred to here, is that last copied in this record.) And afterwards, on the same day, (it being the day and year first herein written,) by consent of the parties, by their attorneys, this cause was set down for hearing, and came on to be heard upon the bill, the answer of William King, and the exhibits; and being submitted without argument, it seems to the court that the provisions of the will contained in the devise to William King, having totally failed, and the object of the testator thereby defeated, the said devisee, William King, holds the estate in the devise mentioned, in trust, for the benefit of the heirs of the testator. And it appearing to the court that the complainants are, in part, the heirs of the testator, and are entitled to take descent as follows, viz. The said John Mitchell; Polly Trigg, the wife of Abram B. Trigg; Rachel Litchfield, wife of George V. Litchfield—being children of Elizabeth Mitchell, who was a sister to the testator of the whole blood, are entitled to one-twelfth part, each, of the testator's real estate, devised as aforesaid. That Alexander Findlay; Elizabeth Trigg; Nancy Goode, wife of John Goode; Mary Henderson, wife of Littleton Henderson—children of Nancy Findlay, who

was a sister to the testator of the whole blood, are each entitled to one twenty-fourth part of the real estate of the testator. That William Hickman, and Ann Hickman, infant children of Sally Hickman, deceased, who was a daughter of the said Nancy Findlay, are each entitled to one forty-eighth part of the real estate aforesaid. That William K. Trigg, and Daniel Trigg, children of Rachel Trigg, a daughter of the said Nancy Findlay, (who could not inherit in consequence of her alienage,) are entitled to one forty-eighth part, each, of said real estate. It is therefore adjudged, ordered, and decreed, that John H. Fulton, Samuel Logan, and Edward Fulton, or any two of them, who are hereby appointed commissioners for that purpose, do make partition and distribution of the real estate aforesaid, of the testator, William King, among his heirs at law, and assign, to the plaintiffs, according to their interest therein, as aforesaid, except that part thereof which has been assigned, as dower, to the widow of the said testator; and that they make report to this court. And it is further ordered, adjudged, and decreed, that the injunction granted the plaintiffs in this cause, on the 24th day of September, 1830, be made perpetual; and that the said plaintiffs recover of the defendant their costs about their suit in this behalf expended. But that the rights of the heirs of James King, (except William King, the devisee,) Samuel King, the children of Hannah, and of William Heiskell and wife, be not affected by this decree; and the cause is continued until the next term.

From the foregoing decree, the defendant prayed an appeal to the Supreme Court of the United States, which is granted on his (or some person for him) entering into bond, with sufficient security, in the penalty of five hundred dollars, conditioned according to law, which bond was executed by James White, with Joseph Draper as his security.

The appeal bond is as follows:

[*Appeal bond.*]

Know all men by these presents, that we, James White and Joseph Draper, are held and firmly bound unto John Mitchell; Abram Trigg, and Polly, his wife; George V. Litchfield, and Rachel, his wife; Joseph Trigg, and Elizabeth, his wife; John Goode, and Nancy, his wife; Littleton Henderson, and Mary, his wife; William Hickman, and Ann Hickman, infant children of Sally Hickman, by Adam Hickman, their father and next friend; William K. Trigg; and Daniel Trigg; and Alexander Findlay; in the just and full sum of five hundred dollars, to be paid to the said Mitchell, A. Trigg and wife, Litchfield and wife, Joseph Trigg and wife, Goode and wife, Henderson and wife, William and Ann Hickman, by &c., William K. Trigg, Daniel Trigg, and Alexander Findlay, their executors, administrators, or assigns; for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this twentieth day of September, in the year eighteen hundred and thirty-two.

The condition of the above obligation is such, that, whereas, at a district court of the United States, for the western district of Virginia, continued and held at Wythe court-house, on Thursday, the 20th day of September, 1832, in a suit in chancery depending in said court, between the above named John Mitchell; Abram Trigg, and Polly, his wife; George V. Litchfield, and Rachel, his wife; Joseph Trigg, and Elizabeth, his wife;

John Goode, and Nancy, his wife; Littleton Henderson, and Mary, his wife; William Hickman, and Ann Hickman, infant children of Sally Hickman, by Adam Hickman, their father and next friend; William K. Trigg; and Daniel Trigg; and Alexander Findlay, plaintiffs—and William King, defendant—a decree was rendered in favor of the said plaintiffs against the said defendant, from which decree the said William King hath appealed to the Supreme Court of the United States: If, therefore, the said William King, shall prosecute the said appeal with effect, or pay and satisfy the decree aforesaid, and all such costs and damages as shall be awarded against him in case the said decree shall be affirmed, then this obligation to be void, else to remain in full force and virtue.

JAMES WHITE. [SEAL.]
J. DRAPER. [SEAL.]

Signed and acknowledged in presence of }
A. B. MOORE. }

The following exhibit is filed:

SUPREME COURT OF THE UNITED STATES,
January Term, 1830.

Mr. Chief Justice Marshall delivered the opinion of the court in the case of Finlay and Mitchell vs. William King's lessee, as follows:

[*Opinion of Supreme Court in Finlay and Mitchell vs. King's lessee.*]

This is a writ of error brought to a judgment rendered in an ejectment by the court of the United States for the western district of Virginia. The judgment was pronounced, on a case agreed, in the following words:

"We agree that William King departed this life on the 8th day of October, 1808, having first made and published his last will and testament, which was afterwards admitted to record in the county court of Washington county, in Virginia, where he resided, and is in the words and figures following:

Meditating on the uncertainty of human life, I, William King, have thought proper to make this my last will and testament, leaving and bequeathing my worldly estate in the manner following, to wit: To my beloved wife, Mary, in addition to her legal dower of all my estate, the dwelling house and other buildings on lot number ten in Abingdon, where I now reside, together with the garden, orchard; and that part of my Fruit Hill plantation south of the great road, and lands adjacent to Abingdon, now rented to C. Findlay & Co, and, at my father's decease, including those in his occupancy on the north side of the great road, for her natural life.

I also will and declare that, in case my beloved wife, Mary, hath hereafter a child or children by me, that the said child or children is and are to be sole heirs of my whole estate, real and personal, excepting one third part of specified legacies and appropriations hereinafter mentioned, which, in case of my having children, will reduce each legacy hereinafter mentioned to one third part of the amount hereafter specified, and the disposition of the real estate, as hereafter mentioned, in that case wholly void. In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg's, and my niece Rachel, his wife, lately Rachel Findlay, in trust, for the eldest son or issue of said mar-

riage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King's, or of sister Elizabeth's, wife of John Mitchell, and to their issue; and during the life time of my wife, it is my intention and request, that William Trigg, James *Trigg*, and her, do carry on my business in copartnership, both salt works and merchandising, and equal shares; and that, in consideration of the use of my capital, they pay out of the same the following legacies:

To John Mitchell, on condition of his assisting and carrying on business them, at the usual salary as formerly, viz. one thousand dollars per year, for from two to five years, as they may wish his assistance, an additional sum of ten thousand dollars, payable five years after my decease; and to each of his children, on coming of age, one thousand dollars more than the general legacy hereafter mentioned. To Connally Finlay a like sum of ten thousand dollars, payable in five years.

To my nieces, Elizabeth Findlay and Elizabeth Mitchell, (being called for my grandmother, with whom I was brought up,) ten thousand dollars, in twelve months after marriage, provided they are then eighteen years of age, if not, at the age of eighteen; to each of my other nephews and nieces, at the age of eighteen, that is, children of my brother James, sisters Nancy and Elizabeth, one thousand dollars each; to each of the children of my brother Samuel, and half sister Hannah, three hundred dollars each, as aforesaid; to my said sister Hannah, in two years after my decease, one thousand dollars; and to my half brother Samuel, in case of personal application to the manager at Saltville, or to my executors in Abingdon, on the first day of January, annually, during his life, one hundred and fifty dollars; if not called for on said day, to be void for that year, and receipt to be personally given. It is my wish and request that my wife, William Trigg, and James King, or any two of them that shall concur in carrying on the business, should join with all the young men that may reside with me, and be assisting me *in my decease*, that are worthy, or furnish them with four or five thousand dollars worth of goods, at a reasonable advance, on a credit of from three to five years, taking bonds, with interest, from one year after supply. In case my brother James should prefer continuing partnership with Charles S. Carson, in place of closing the business of King, Carson & King as soon as legal and convenient, then my will is, that William Trigg and my wife carry on the business, one-third of each for their own account, and the remaining third to be equally divided between the children of my brother James and sister Nancy and Elizabeth. To my father, Thomas King, I leave, during his life, the houses he now resides in and occupies, at Fruit Hill, together with that part of my land, in said tract north of the great road, that he chooses to farm, with what fruit he may want from the orchard; the spring house, being intended for a wash house, with the appurtenances, subject to the direction of my beloved wife, Mary; as also the orchard, except as aforesaid. I also leave and bequeath to my father, the sum of two hundred dollars per annum, during his life; and if accidentally fire should destroy Fincastle house and buildings, a further sum of two hundred and twenty dollars per annum, while his income from these would cease. I also leave and bequeath to the Abingdon Academy the sum of ten thousand dollars, payable to the trustees in the year one thousand eight hundred and sixteen, or lands to that amount, to be vested in said academy, with the interest or rents thereon, forever.

WILLIAM KING.

ABINGDON, (Virginia,) 3*d March*, 1806.

I hereby appoint William Trigg, of Abingdon, and James King, of Nashville, executors of my last will and testament enclosed; written by my own hand, and signed, this 3d day of March, 1806.

WILLIAM KING.

We agree that William King, at the time of his death, was seized and possessed of 75 tracts of land in the said county of Washington, containing, in the whole, 19,473 acres of land, on one of which tracts is the salt works, which have, since his death, been leased for years at the annual rent of $30,000. Also, of 19 lots in the town of Abingdon, in Washington county, 9 of which produced an annual rent of $660. Also, of 14 tracts of land in the county of Wythe, containing 3,494½ acres. Also, of 18 tracts of land in the State of Tennessee containing, in the whole, 10,880 acres. Also, of shares in town lots, in several of the towns in the State of Tennessee. We also agree that the said William King survived his father, in the said will mentioned; that the said William King had brothers and sisters, to wit, James King, a brother of the whole blood; Nancy, a sister of the whole blood, the wife of Connally Findlay, in the will mentioned; Samuel King, a brother of the half blood; Hannah, a sister of the half blood, the wife of John Allen; —all of which brothers and sisters, before named, survived the said William King. That another sister of the William King, of the whole blood, died before him, and was named Elizabeth, the wife of John Mitchell, who is mentioned in the will. We agree that William King, the lessor of the plaintiff, is the same William King, the son of James King, brother of the testator, mentioned by him in the will. We further agree that William Trigg, in the will mentioned, departed this life on the 4th day of August, 1813, leaving Rachel Trigg, in the will mentioned, his widow, and four sons, the said Rachel having born them to the said William Trigg, and not having born any daughter to him, the said William Trigg, at any time, which said sons are all living. That Mary, who was the wife of the said William King, is still living, aged 43 years, and is now the wife of Francis Smith. We further agree that William King, the lessor of the plaintiff, is married to Sarah Behum; that James King had only one daughter, named Rachel Mary Eliza, who is now the wife of Alexander McCall; and that Elizabeth, the wife of John Mitchell, had only two daughters, to wit, Elizabeth, who is now the wife of William Heiskell, and Polly, who is now the wife of Abraham B. Trigg. We agree that William King, the testator, died seized and possessed of the house and lot in the declaration mentioned. We agree the lease, entry, and ouster, in the declaration supposed, and that the defendants are in possession of the house and lot in the declaration mentioned. If, upon this state of facts, the lessor of the plaintiff ought to recover at this time, we agree that judgment shall be entered for him; and that, if the court shall be of opinion that he ought not to recover until after the death of Mary, the wife of Francis Smith; or that he ought not at any time to recover, judgment shall be entered in favor of the defendants.

In this case, three questions have been made at the bar:

1st. Is the condition on which the testator has devised his real estate, in trust to William King, a condition precedent or subsequent?

2d. If subsequent, at what time does the estate vest in possession?

3d. What is the nature of the estate, when vested?

1st. Is the condition precedent or subsequent?

The words of the will, are, "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition of his marrying a daughter of William Trigg's, and my niece Rachel, his wife, lately Rachel Findlay, in trust, for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of William and Rachel Trigg, that will marry a child of my brother James King's, or of sister Elizabeth's, wife of John Mitchel, and to their issue. It was admitted in argument, and is certainly well settled,* that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention. If the language of the particular clause, or of the whole will, shows that the act on which the estate depends, must be performed before the estate can vest, the condition is, of course, precedent, and unless it be performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent.

In the case under consideration, the testator does not, in terms, give his real estate to William King, on his marrying the daughter of William and *Mary* Trigg, but at the death of his, the testator's, wife, on condition of his marrying a daughter of William and *Mary* Trigg. Whatever doubts may be entertained respecting the lands not given to the wife for life, the testator has expressed clearly his intention, that the lands encumbered with his wife's life estate should come to the possession of William King, at her death. He gives the estate, at that time, without requiring that the conditions annexed to it should be previously performed. The estate then vests in possession, whether the condition on which it was to depend be or be not performed. It cannot be supposed to have been his intention, that the devisee should take possession under this devise, before the interest vested in him. The interest, therefore, must have vested previously, or at that time. The language of the testator does not indicate the intention that the marriage must take place during the life of his wife; nor do the circumstances of the parties justify us in imputing such an intention to him. The time of her death was uncertain, and it might follow close upon his own. The contemplated marriage could not possibly take place until the lapse of many years, because one of the parties had not come into existence. William and *Mary* Trigg had not, at the time, and never have had, a daughter. The testator, therefore, has fixed a time when the estate is to vest, which might probably precede the happening of the event on which its continuance is to depend. This is clearly a condition subsequent, as to those lands in which an estate for life is given to the wife of the testator. Does any reason exist, which will authorize a distinction between those lands in which the wife took a life estate, and those of which no other present disposition is made in the will. The testator makes no distinction. In one clause, he gives "his whole real estate, at the death of his wife, to William King, son of his brother, James King, on condition, &c." If, as the language would seem to indicate, the devisee was entitled to possession of the whole property at the

* Willis 156. 2 Bos. and Pul. 295. 1 D. and C. 645.

same time, that is, at the death of the testator's wife, it would follow that the condition, on which the whole depends, is a condition subsequent. If the devise should be construed, as the defendant in error contends, to give William King a right to the immediate possession of that part of the estate of which no other disposition is made, does this circumstance furnish any reason for the opinion that this part of the estate depends on a condition precedent? We think not. The will might then be construed as if it were expressed thus: "In case of having no children, I then leave and bequeath all my real estate, subject to the devise to my wife for life, to William King, son of my brother, James King, on condition of his marrying," &c. This is the most unfavorable manner for the defendants in error, in which the question can be presented. It waives the benefit derived from fixing a time for the possession of a considerable part of the estate, which might very probably precede the event on which its continuance is made to depend. Had even this been the language of the will, the estate in the lands would, we think, depend on a condition subsequent.

It is a general rule, that a devise in words of the present time, as, I give to A my lands in B, imports, if no contrary event appears, an immediate interest, which vests in the devisee on the death of the testator. It is also a general rule, that if an estate be given on a condition for the performance of which no time is limited, the devisee has his life for the performance. The result of these two principles seems to be, that a devise to A, on condition that he *sall* marry B, if uncontrolled by other words, takes effect immediately, and the devisee performs the condition if he marry B at any time during his life. The condition is subsequent. We have found no case in which a general devise, in words importing a present interest in a will making no other disposition of the property, on a condition which may be performed at any time, has been construed, from the *mere* circumstance that the estate is given on condition, to require that the condition must be performed before the estate can vest. There are many cases in which the contrary principle has been decided.* We think, then, that the condition on which the devise to William King depended, was a condition subsequent.

2d. The second point is one of more difficulty. Does that part of the real estate, which is not otherwise expressly disposed of, vest in William King immediately, or at the death of the testator's wife? The words are, "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of brother James King, on condition," &c. These words certainly import, that the whole estate should vest in possession at the same time, and mark with precision when that time shall be. This express provision can be controlled only by a strong and manifest intent, to be collected from the whole will. But the intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although, in giving effect to it, some words should be rejected, or so restrained in their application, as materially to change the literal meaning of the particular sentence. The counsel for the defendant in error insists, that the intent to give the real estate, not otherwise disposed of, immediately to William King, is apparent on the face of the will, and

* 2 Adk. 18. Cases T. T. 164-6. 2 P. W. 626. Pow. on Dev. 257. 1 Salk. 170. 4 Mod. 68. 2 Salk. 570.

must control the construction of the clause under consideration. This proposition has been so fully discussed at the bar, that the court need only re-state the principles which have been already advanced in the argument. Of the immense estate left by the testator, about one-half, including her dower, was given to his wife, and others, for her life. The residue was given to William King immediately, on the trust mentioned in the will, or given by implication to the testator's wife, or was permitted to descend to his heir at law. As the devise to William King was on a condition subsequent, it may be construed, so far as respects the time of taking possession, as if it had been unconditional. The condition opposes no obstacle to his immediate possession, if the intent of the testator shall require that construction. We will first consider the supposed implied devise to the wife.

As William King was not the heir of the testator, a devise to him, at her death, does not necessarily imply an estate in her during life; and the will itself furnishes strong reason for rejecting this construction. His wife, as might well be supposed, was first in his mind, and was kept in his mind throughout the will. He notices her legal right to dower, so as to *a avoid* possible implication that what he gave her was in lieu of dower, and to secure her from the necessity of relinquishing all interest in the estate bequeathed to her, as preliminary to claiming her dower. She claims her dower under the will, as she does the other large estates bequeathed to her. It is not probable that a person, who was careful to notice even that to which she would have been entitled under the law, would have omitted totally a very large property which she could claim only under the will. He even notices the remainder in a small property in the occupancy of his father; and mentions his wife in many other parts of his will, in a manner to add to the improbability of his having totally omitted her name, when a very large benefit was intended. It seems to us to be contrary to reason, and to the ordinary rules of construction, to intend that a large estate is given by an unnecessary implication, to a wife who takes her dower in the whole, and also a large part by express words. We think it very clear that there is no implication devise to the wife. Does the property in question descend to the heir at law during the life of the wife? Was it the purpose of the testator to die intestate with respect to it till her death? We cannot think that such was his purpose, or that his will authorizes the court to say so. The introductory clause indicates an intention to dispose of all his estate. He says, "I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my worldly estate in the manner following." These words are entitled to considerable influence in a question of doubtful intent, in a case where the property is given, and the question arises between the heir and devisee, respecting the interest devised. The words of the particular clause, also, deny the whole estate from the heir, but they fix the death of the testator's wife as the time when the devisee shall be entitled to possession. They are, "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of my brother James," &c. It is admitted, that if this clause stood alone, unexplained by other parts of the will, the real estate, not otherwise disposed of, would descend to the heir. The law gives to him whatever is not given to others. But if other provisions in the will show an intent that the legal title of the heir should not

prevail, those other provisions must be respected in construing the instrument.*

When the will was made, the testator's father was alive, and was consequently to be considered as his heir. He was an old man, and the provision made for him seems to have contemplated only a comfortable supply for the wants of one who had grown up and lived in simple, unexpensive habits. The testator gives him, for life, the houses in which he then resided, with so much land as he might choose to farm, what fruit he might want, and the spring house, subject to the direction of his wife; also, the sum of $200 per annum, during his life; and, if fire should destroy the Fincastle house, a further sum of $220 per annum, while his income from that source should be suspended. This property is given to his wife, for life, on the death of his father. These moderate provisions for the heir, contemplating only the ease and comfortable supply of the wants of an old man, comport very little with the idea of leaving an immense estate, consisting, among other articles, of numerous tracts of land, remote from each other, most probably of very difficult management, to descend to him. It is not probable that this estate would be left to descend to him for the life of Mrs. King. Her surviving him was probable, and the testator reputed that she would survive him. The lands devised to him, are given to her for life. The father, who was the presumptive heir when the will was made, died during the life of the testator. This event is not supposed to effect the construction of the will. But were it otherwise—were it supposed that he might look forward to that event, and contemplate his brothers and sisters as his probable heirs, the will furnishes arguments of great weight in support of the opinion that he did not intend them to take any thing not expressly devised to them. The heirs of the testator, at the time of his death, were James King, a brother of the whole blood; Nancy Findlay, a sister of the whole blood; Elizabeth and Polly, the daughters of Elizabeth Mitchell, a sister of the whole blood; Samuel King a brother of the half blood; and Hannah Allen, a sister of the half blood. Each of these persons is noticed in the will. For some of them an ample provision is made. To others, less favor is shown. The legacies to his brother and sister of the half blood are inconsiderable, while his bequests to those of the whole blood are large. No one of them is omitted. The circumstances, that his mind was clearly directed to each, and that he has carefully measured out his bounty to each, discriminating between them so as to show great inequality of affection, operate powerfully against the opinion that he intended to leave a very large property to descend upon them by the silent operation of law. The whole will proves the primary intention of the testator to have been to keep his immense real estate together, and to bestow this splendid gift on some individual who should proceed from the union of his own family with that of his wife. In case of having no children, he gives his real estate, at the death of his wife, to William, the son of his brother James, on condition of his marrying a daughter of William Trigg, and Rachel his wife, in trust, for the eldest son or issue of said marriage. If such marriage should not take place, he gives said estate to any child, giving preference to age, of William and Rachel Trigg, who should marry a child of his brother James, or of his sister Elizabeth. William Trigg was the brother of his wife. His

* Ca. T. T. 157. 160, 1. 3 T. W. 295. 1 Wil. 333. 1 Vez. 226. 1 Wash. 97. 107 1 Call 132. 1 Munf. 143, 5.

primary object, then, is the issue of marriage between his nephew, William King, and a daughter of William Trigg, by his then wife, the niece of the testator. His second object was, the issue of any marriage which might take place, between any child of William and Rachel Trigg, and any child of his brother James, or of his sister Elizabeth. That both these objects have been defeated, by the course of subsequent events, does not change the construction of the will. The testator undoubtedly expected the one or other of them to take place, and his intention respecting the immediate interest of the devisee, or the descent to the heir, is the same as if a daughter had been afterwards born to William and Rachel Trigg, who had intermarried with William King. The will, therefore, is to be construed, in that respect, as if the contemplated marriage had been actually consummated. It was not very improbable, at the date of the will, that the devisee of this immense fortune might come into existence in less than twenty years, nor that the wife might live fifty years. In the mean time, no provision whatever is made for him. To what purpose should the profits of the estate, intended for him, be withheld during the life of the testator's wife, since those profits were not to be received by her? Why should her death be the event on which lands, in which no interest was given to her, should be enjoyed by the devisee? We perceive, at once, the reason why the devise of those lands, in which she had a life estate, should take effect at her death; but there is no reason for postponing the possession of lands from which she could derive no benefit, and which were not given to others to the same period. The devise over, too, has considerable influence on this question. It may be on a contingency too remote to be supported by law, but the testator's intention is not the less manifest on that account. He did not suppose it too remote; and, in fact, it might have happened in a few years. Had William King, the devisee, died young, or had William or Rachel Trigg died without leaving a daughter, a fact which has actually happened, and any child of William and Rachel Trigg had married a child of James King, or of Elizabeth Mitchell, then the whole estate is given to such child, and to the issue of the marriage. Had either of these events taken place, the estate is given from the heirs. It consists very well with the general intention of the testator, and his mode of thinking, as manifested in his will, to suppose an intention that the profits should accumulate for the benefit of those for whom the estate was designed. We can perceive nothing in the will to countenance the idea that he contemplated the descent of these lands to his heirs. Nothing could be more contrary to his general purpose, than the distribution which the law would make of his real estate among his heirs. This may be the result of a total failure of all the provisions in the will, but cannot be considered as the immediate effect, if a contrary intention is perceived, and if the words can be so construed as to suppose that intention. The words used by the testator, show that nothing was farther from his mind than a partial intestacy. He says, he has thought proper to make his will, "leaving and bequeathing his worldly estate in manner following." After making a considerable provision for his wife, and devising to others during her life, he gives "all his real estate, at her death," to his nephew, on condition; and on failure to perform the condition, gives "the said estate" over. Being about to devise all his estate to his nephew, and knowing that his wife and others would hold a large part of it for her life, it was obvious that his nephew could not take all till her death. But if he devised the whole estate, that which could not be taken by the wife, or by others for

her life, would pass to the nephew, if a clear intention appears in the whole will to intercept the descent to the heir, although the clause, taken literally, would postpone the possession, even of that part in which the wife has no interest, till her death. To effect this intention, the court will vary the strict meaning of words, and will sometimes transpose them.* The word "all" may be transposed, so that the clause may read: "In case of having no children, I then leave my real estate, ALL at the death of my wife, to William King," &c. Let the clause be thus read, and no man would hesitate on its construction. The whole estate is devised to William King, but the possession of that part of it which is given to the wife, or others, for her life, is postponed till her death. The whole will bears marks of being written by a man whose language was far from being accurate, and whose words, if taken literally, would in some instances defeat his intention. That intention, we think, was to devise his whole real estate to William King, in trust, on a condition subsequent, postponing the possession of that part of it which was given to the wife, and others, for her life, till her death.

3d. The third point is one of great interest to the parties. Did William King take an estate, which, in the events that have happened, enures to his own benefit; or is he, in the existing state of things, to be considered as a trustee for the heirs of the testator?

This question cannot properly be decided in this cause. It belongs to a court of chancery, and will be determined when the heirs shall bring a bill to enforce the execution of the trust. We do not mean to indicate any opinion upon it. The legal title is, we think, in William King, whoever may claim the beneficial interest; and the judgment is therefore affirmed, with costs.

WASHINGTON, *February* 24, 1830.

I hereby certify that the foregoing is a true copy of the opinion of the Supreme Court of the United States, in the case of Findley and Mitchell against William King, delivered by Mr. Chief Justice Marshall, at January term, eighteen hundred and thirty.

RICH. PETERS,
Reporter of the decisions of the Supreme Court of the United States.

UNITED STATES OF AMERICA, } *ss.*
Western District of Virginia, }

I, Jasper Yates Doddridge, clerk of the United States' court for the western district of Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings in a certain suit in chancery, depending in said court, held at Wythe court-house, between John Mitchell and others, plaintiffs, and William King, defendant, with all things touching the same, as fully and wholly as they now exist among the records of my office.

J. Y. DODDRIDGE, *Clerk.*

4th December, 1832.

Plaintiffs' costs - - - - - - -	$64 69⅔
Defendant's costs, (excluding fee for this record)	27 17¼
Fee for this record - - - - - - -	17 76

A. B. MOORE, *D. C.*

* 1 Call 132.